IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2008 Session

STATE OF TENNESSEE v. RICKY LYNN EARLS

Direct Appeal from the Circuit Court for Bedford County
No. 14684 Lee Russell, Judge

No. M2005-01931-CCA-R3-CD - Filed December 4, 2008

Following a jury trial, Defendant, Ricky Lynn Earls, was convicted of theft of property valued over $1,000, a Class D felony. The trial court sentenced him as a career offender to twelve years. Defendant appealed on the sole issue of the sufficiency of the convicting evidence, and Defendant's conviction was upheld on appeal. State v. Ricky Lynn Earls, No. M2001-00063-CCA-R3-CD, 2001 WL 1285927 (Tenn. Crim. App., at Nashville, Oct. 25, 2001), perm. to appeal denied (Tenn. Mar. 4, 2002) Defendant subsequently filed for post-conviction relief, alleging ineffective assistance of counsel, which was denied by the post-conviction court. On appeal, this Court remanded the matter to the post-conviction court to determine whether, but for counsel's deficient performance, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence. State v. Ricky Lynn Earls, No. M2003-01741-CCA-R3-CD, 2005 WL 901144, at *5 (Tenn. Crim. App., at Nashville, Apr. 19, 2005), no perm. to appeal filed. Following a hearing, the post-conviction court granted Defendant a delayed appeal. After a hearing, the trial court denied Defendant's motion for new trial. On appeal, Defendant argues that the trial court (1) erred in not requiring the State to make an election of offenses; (2) erred in its instructions to the jury on his theory of defense; and (3) failed to give limiting instructions to the jury on evidence of other crimes. After review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined. THOMAS T. WOODALL, J., not participating.

Graham Richard, Nashville, Tennessee, (on appeal), and Andy Myric, Fayetteville, Tennessee, (at trial), for the appellant, Ricky Lynn Earls.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General, William Michael McCown, District Attorney General; Michael D. Randles, Assistant District Attorney General; and Weakly Eddie Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

The facts supporting Defendant's conviction were summarized by this Court on Defendant's initial appeal as follows:

> Shannon Gray, who owns the [Davis Hill Market], testified that on August 15, she was working alone and that about 1:00 p.m., the defendant, three children, and a woman entered the store. She said that before they came in, she had been counting money and preparing a bank deposit for the next day. She said that she had finished counting the money and that she was banding it. She said that because she does not like to handle money in front of customers, when the defendant entered the store, she put the money in a deposit bag, zipped the bag, and laid it on the store counter. She said that the bag was a couple of feet to her left and behind a cigarette rack. She said that the defendant stood just inside the door while the woman and the children walked around the store. She said that while the defendant was standing at the door, he could have seen the deposit bag. She said that the woman and the children brought snacks to the cash register and that she began ringing up the items. She said that the children went outside while the woman paid for the items with a food stamp card. She said that in order to complete the transaction, she had to bend over and swipe the card through a machine that sat on a shelf below the cash register.
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> Ms. Gray testified that as she was bending over to run the food stamp card through the machine, she heard a sound to her left. She said that she looked up and noticed that the defendant had moved away from the front door, which was to her right, and was kneeling in front of the cigarette rack, which was to her left and slightly behind her. She said that she saw the cigarette rack move forward and that she asked the defendant, "What is it?" She said that she leaned over the counter and saw the defendant squatting in front of the rack. She said that he was resting on the heels of his feet and that he was stuffing something into the front of his pants. She said that she thought the defendant was stealing cigarettes. She said that the defendant told her that he dropped all of his change and that she heard his change hit the floor. She said that the woman walked over to the defendant and asked him, "You got it?" She said that the woman was standing between her and the defendant and that she could not see the defendant very well. She said that she tore the receipt from the food stamp machine and that the woman came back to the counter and asked her if she needed to sign anything. She said she thought that was unusual because the woman had used the food stamp card in the store before and had never had to sign a receipt.
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> Ms. Gray testified that the woman went outside and that the defendant asked her about the prices of oil and transmission fluid. She said that she told him she did not know the prices but that the bottles of oil and transmission fluid were by the front door, where he had been standing earlier. She noticed that when the defendant stood

up, he already had a bottle of oil and a bottle of transmission fluid in his hand. She said that he threw his change on the counter and quickly walked out the door. She said that he did not wait for her to count the money. She said that she walked around the counter to the cigarette rack and saw cigarettes on the floor. She said that she looked out the door and saw the defendant using one hand to stuff her deposit bag into the back of his pants while he held the bottles of oil and transmission fluid in his other hand. She said that she looked at the counter and saw that her deposit bag was gone. She said that the defendant ran across the parking lot, got into a car, and quickly drove away.

Ms. Gray testified that when a customer came into the store, she asked the customer to get her husband for her. She said that when her husband got to the store, they called the police. She stated that the deposit bag contained $1,261. On cross-examination, she acknowledged that the store had video cameras but that she had not turned them on that day. She said that she had seen the woman in the store about eight times but that she had never seen the defendant before.

Detective Eric Stephenson of the Bedford County Sheriff's Department testified as follows: On August 15, 1999, Captain Steve Elliott went to the Davis Hill Market to investigate a theft. Ms. Gray gave Captain Elliott a food stamp receipt. From the receipt, Detective Stephenson was able to determine that the food stamp card, which was used to buy snacks at the time of the theft, belonged to Nancy Cooper, the defendant's mother. On August 20, 1999, Detective Stephenson showed Ms. Gray a photograph array of six females. Without hesitation, Ms. Gray identified Ms. Cooper as the woman who was in the store with the defendant. On August 26, 1999, Detective Stephenson showed Ms. Gray a photograph array of six men. Without hesitation, Ms. Gray identified the defendant as the man who took her deposit bag. On cross-examination, Detective Stephenson acknowledged that the sheriff's department did not recover the deposit bag or the money.

Heather Ghea, the defendant's eleven-year-old niece, testified as follows: She went to the Davis Hill Market with her sister, grandmother, and the defendant. While her grandmother paid for snacks, she and her sister went out to the car. The defendant came out of the store after her grandmother. She did not remember if the defendant had anything in his hands when he came out of the store. The defendant was not in a hurry when he drove away from the store.

Lori Ghea, the defendant's thirteen-year-old niece, testified that she went with her sister, grandmother, and the defendant to the Davis Hill Market on August 15, 1999, to get snacks. She said that the defendant was driving and that when they arrived at the store, Shannon Gray was sitting outside in a rocking chair. She said everyone went into the store. She said that she and her sister got snacks and that as they were standing at the store counter with their grandmother, the defendant dropped

his change and bent over to pick it up. She said that after she and her sister got their snacks, they went outside to the car. She said that her grandmother and the defendant remained inside the store. She said that her grandmother came out of the store first and that the defendant came out right behind her grandmother. She said that the defendant did not run out of the store and that he had a bottle of oil in his hand. She said that the defendant raised the hood of the car and put the oil in the car. She said that the defendant put the hood down, threw the bottle of oil in the back seat, and drove the car away from the store at a normal rate of speed. She said that she did not see anything stuffed in the defendant's pants and that they did not have a conversation in the car about money.

On cross-examination, the prosecutor asked Ms. Ghea if she remembered him and Detective Stephenson interviewing her a few days before trial. Ms. Ghea said that she remembered the interview. Ms. Ghea acknowledged that she told the prosecutor and the detective that she could not remember anything that happened in the Davis Hill Market on August 15, 1999. She denied telling them that she did not hear the defendant drop his change or see him bend over to pick it up. Ms. Ghea acknowledged that she told the prosecutor and the detective that she could not remember how fast the defendant came out of the store. However, Ms. Ghea testified that she was lying during the interview and that the defendant walked out of the store. She also denied telling them that she did not remember when the defendant put the oil in the car.

The defendant testified that on August 15, 1999, he was living with his mother and that he and his family stopped by the Davis Hill Market about 1:00 p.m. He said that he had been to the Davis Hill Market about twenty times before and that he had known Shannon Gray for about eight months. He said that when he pulled up to the store, Ms. Gray was sitting on the porch in a rocking chair. He said that everyone went into the store. He said that his mother and two nieces got snacks while he stood at the door. He said that Ms. Gray went behind the counter and that his mother started paying for the snacks with her food stamp card. He said that he asked Ms. Gray about the price of oil and that she told him the price was on the oil rack. The defendant said that he got a bottle of oil and that he was standing behind his mother when he dropped his change. He said that he did not see a deposit bag on the counter. He said that his mother and nieces left the store and that Ms. Gray rang up his bottle of oil. He said that Ms. Gray asked him if he would buy some Dilaudid pills for her and that she gave him $425 to buy seventeen Dilaudid pills. He said that she told him that if he got the pills for her, she would give him two of them. He said that he put his change on the counter to pay for the oil. He said that Ms. Gray told him that he did not give her enough money for the oil but that he could pay the rest when he came back with the pills. He said that he took the $425 and put it in his pocket. He said that he walked outside and emptied the bottle of oil into the car. He said that he put the empty bottle on the back floorboard and that he drove the car

away from the store at a normal rate of speed. He said that he kept the $425 and never bought the pills for Ms. Gray. On cross-examination, the defendant acknowledged that he had been previously convicted of sixteen counts of forgery and one count of felonious escape.

The state recalled Ms. Gray as a rebuttal witness. She said that she did not ask the defendant to buy Dilaudid tablets for her and that she did not give him $425. She denied telling the defendant that if he bought the pills for her, she would give him two of them. She said that she has never been involved with buying Dilaudid.

Rickly Lynn Earls, 2001 WL 1285927, at *1-3.

II. Analysis

In his late-filed motion for new trial, Defendant argued that (1) the evidence was insufficient because the victim's testimony was uncorroborated; (2) the State withheld exculpatory evidence; (3) the trial court erred in not excluding a juror from the panel because he was familiar with Defendant's family; (4) the jury was allowed to see Defendant in shackles prior to trial; and (5) the public defender's office engaged in improper conduct. In his appeal, Defendant abandons these issues and argues for the first time that the trial court erred in not requiring the State to make an election of offenses and erred in its jury instructions. When an issue is raised for the first time on appeal, it is typically waived. See Tenn. R. App. P. 3(e); State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Defendant acknowledges that he did not object to the trial court's instructions at trial. Defendant, however, asks us to review his issues pursuant to Rule 52(b) of the Tennessee Rules of Criminal Procedure (providing that "an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal").

To recognize the existence of plain error, this Court must find each of the following five factors applicable: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors first articulated in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); see also Tenn. R. Crim. P. 52(b). "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

Defendant was indicted on one count of theft of property valued between $1,000 and $10,000. In support of a conviction on the charged offense, the State offered evidence that Defendant took a bank deposit bag from the Davis Hill Market containing $1,261.00. During his direct examination, Defendant denied that he took the deposit bag, but admitted that Ms. Gray gave

him $425.00 to buy Dilaudid pills, and that he kept Ms. Gray's money without purchasing the drugs. In other words, Defendant's theory of defense was that he was guilty of a theft offense against the victim, just not the charged offense.

Based on his theory of defense, Defendant argues that the trial court erred in not requiring the State to make an election of offenses. An election of offenses is required when the State pursues conviction of a single offense and offers evidence at trial that the defendant committed more than one incident of the crime during the time period alleged in the indictment. State v. Adams, 24 S.W.3d 289, 294 (Tenn. 2000). In this instance, the State pursued conviction of only one theft offense, that being the theft of the deposit bag with the money contained therein, and did not offer any evidence of other thefts of a deposit bag. Although Defendant testified that he committed a different theft offense against the victim, he was not on trial for that offense.

The State is required to elect which particular offense it wants the jury to deliberate on when the State submits proof that a defendant has committed the crime for which he is charged, on multiple and distinct occasions, during an "open ended" time period alleged in the indictment. There is absolutely no requirement that the State make an election of offenses between the crime alleged in the indictment and a different crime admitted to by the defendant in his proof. Accordingly, Defendant has failed to show that a clear and unequivocal rule of law has been breached, and, consequently, no plain error was committed by the trial court. Defendant is not entitled to relief on this issue.

Relying on State v. Waller, 118 S.W.3d 368, 373 (Tenn. 2003), Defendant also contends for the first time on appeal that the trial court improperly instructed the jury that his testimony concerning the alleged drug transaction with Ms. Gray could be considered to evaluate his credibility, and the improper instruction rises to the level of plain error.

After a discussion with the State and defense counsel outside the presence of the jury, the trial court charged the jury, without objection, as follows:

> If from the proof you find that the defendant committed a crime other than that for which he is on trial, you may not consider such evidence to prove his disposition to commit such a crime as that on trial. You may, however, consider the conduct as and to the extent that it is probative of the defendant's credibility as a witness. In this case, the defendant testified that he took money from Shannon Gray to obtain illegal drugs. The defendant is not on trial for that alleged activity and in fact that alleged activity is a part of the defendant's defense. That alleged activity is the defendant's explanation for what went on between the defendant and Shannon Gray while the defendant was in Mrs. Gray's store on the date of the alleged theft. You jurors are the sole and exclusive judges of the facts in this case and you will determine what went on between Shannon Gray and [Defendant] on this occasion. You will assess the credibility of these two witnesses as you would assess the credibility of other witnesses.

In Waller, our supreme court considered a challenge to the trial court's admission of the defendant's prior drug possession convictions to impeach his credibility under Rule 609 of the Tennessee Rules of Evidence. Id. at 371. The supreme court concluded that the offenses for which the defendant had been convicted do not involve "dishonesty or false statement" as contemplated in Rule 609, and at best were only slightly probative of the defendant's credibility. Id. at 372-73.

The situation presented in Waller is clearly distinguishable from the case sub judice. A Rule 609 analysis is intended to address the potential danger that jurors will improperly consider a testifying defendant's prior conviction, which is offered by the State during cross-examination for impeachment purposes, as evidence of the defendant's propensity to commit the crime. In this instance, however, Defendant himself interjected evidence of his alleged drug transaction with the victim to support his theory of defense that he did not commit the indicted offense. The State on cross-examination was entitled to clarify the details of this transaction, and, we note that in response to the State's questions, Defendant again insisted that the victim had asked him to purchase Dilaudid pills, and that she had made this request on other occasions. The jury was properly instructed that it was their function to assess Defendant's and Ms. Gray's credibility. The jury was also instructed that Defendant's testimony concerning the drug transaction could not be used as evidence to prove Defendant's disposition to commit the charged offense. The jury is presumed to follow the trial court's instructions, and we conclude that these instructions properly and clearly protected against the possibility of confusion, if any, about the charged offense. See State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). Based on our review, we discern no plain error in the trial court's instructions to the jury.

Based on the foregoing, we conclude that Defendant has failed to establish that he is entitled to relief in this appeal.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE